



agreement (CBA) and that the District refused to bargain these changes thereby violating RSA 273-A:5 I (a), (b), (c), (d), (h) and (i). The District answered those charges on August 23, 1996. The Association filed an amendment to its unfair labor practice charges on November 12, 1996, alleging bad faith and retaliatory actions in violation of RSA 273-A:5 I (a), (b), (c), (d), (e), (g), (h), and (i). The parties appeared for a hearing on November 19, 1996, and jointly requested a continuance so that they might attempt settlement. Jurisdiction was retained by this Board. By letter of December 19, 1996, the Association requested that another hearing be scheduled. The matter was heard before the Board on February 6, 1997.

#### FINDINGS OF FACT

1. The Fall Mountain School District employs teachers and support personnel in the operation of its schools and thereby is a "public employer" within the meaning of RSA 273-A:1 X.
2. Fall Mountain Regional Education Support Personnel Association/NEA-New Hampshire is the duly certified bargaining agent for support personnel employed by the School District.
3. The Association and the District are parties to a collective bargaining agreement (CBA) for the period July 1, 1996, through June 30, 2000, which specifies in Article I, Recognition Clause, that, "[T]he term 'employee' shall include all aides, tutors, secretaries, food service personnel, custodians, maintenance employees and bus drivers...."
4. The terms and conditions of employment for the head custodian were subjects of bargaining during the negotiations which ended in December, 1995. The yearly rates of pay for the head custodian are listed in the CBA in Appendix A, Support Staff Rate Schedule (Joint Exhibit No. 1).
5. The CBA was signed by the parties on December 13, 1995, and approved by the voters in March, 1996. Also, in March, the School Board voted to eliminate the four head custodian positions and to establish the position of custodial services manager. On March 27, 1996, head custodians were sent a letter by Business Administrator Stephen Varone informing them that their positions were to be eliminated effective July 1, 1996, but that alternative employment opportunities might be available. Subsequently, the head custodians were offered positions as lead custodians.

6. Prior to the 1996-97 school year, four head custodians were employed at the various schools. Each reported to a school principal. The change proposed in March, as implemented that summer, added a central supervisor, a custodial services manager, who supervised the four new lead custodians, formerly head custodians. There was an overall reduction in pay from the negotiated rate stated in the CBA. Lead custodians received the same pay as custodians supplemented by a stipend of one thousand dollars.
7. One former head custodian, Richard La Pierre, became the custodial services manager at an increase in pay. Despite changed job descriptions which transferred purchasing, some decision-making and other duties to the custodial services manager, the lead custodians performed most of the duties of former head custodians. They were responsible to the custodial services manager but they also acted on the requests of the school principals as they had always done. They had been told by Richard La. Pierre to file a grievance when asked to perform a task by a principal but to carry out the principal's request before filing the grievance.
8. The lead custodian stipend was eliminated in August, 1996, when the Association complained regarding the School Board's unilateral action and refusal to bargain changes to the head custodian positions. The position of lead custodian was then eliminated altogether when it appeared that the School Board might be required to bargain terms and conditions of employment. The former head custodians were not restored to their previous positions and pay rates but they were required to continue to perform the duties of head custodians.
9. The restructuring plan was originally announced as a reduction in force (R.I.F.). The reduction in force procedure is included as a policy statement in the Fall Mountain Regional Support Handbook (Association Exhibit No. 3) which is incorporated by reference into Article XIV, a side letter of the prior contract. Article XIV (Association Exhibit No. 4) declares a reduction in force to be a management decision not subject to negotiation. It is also defended as an organizational restructuring exempt from bargaining under the management policy exemption of RSA 273-A:1 XI.
10. Business Manager Stephen Varone and Richard La Pierre discussed making such a change in custodial services positions before it was presented to the School Board as early as November, 1995. According to Mr. Varone,

the position of custodial services manager is a non-union position designed with Richard St. Pierre in mind.

#### ORDER AND DECISION

RSA 273-A:1 XI defines terms and conditions of employment to mean wages, hours and other conditions of employment but exempts from terms and conditions of employment matters of managerial policy within the exclusive prerogative of the public employer. The management policy exception has traditionally been raised when broad policy decisions are formulated and implemented by the public employer. Appeal of Watson, 122 N.H. 665, 667 (1982). There are policy matters which may never be bargained and there are subjects which may be bargained only under certain circumstances. Appeal of State of New Hampshire, 138 N.H. 716 (1994). Public employers can negotiate specific management rights provisions into collective bargaining agreements to insulate aspects of a CBA from negotiations. The intent of RSA 273-A is to minimize the impact of public sector bargaining on the public employer's exercise of managerial prerogative while not allowing the management policy exception to mask or shield unfair labor practices. Appeal of Keene State College Education Association, 120 N.H. 32, 35-36 (1980).

In the present case, Fall Mountain School District has cited Article XIV of the prior CBA as evidence that the parties intended to exclude any reduction in force (R.I.F.) from bargaining. The School District's action of eliminating the head custodian positions is described as a reduction in force which is to be excluded from bargaining. However, the description as a R.I.F. is erroneous for two reasons: first, the procedure to accomplish a R.I.F. was not followed (Association No. 3) and second, the head custodians were still employed. The same number of positions were performing essentially the same work under a different job title. The only reduction was in wages and the only significant personnel change was the creation of the position of custodial services manager.

Additionally, the elimination of the head custodian position is defended as a change in structure made as a statutorily protected managerial prerogative which need not be bargained. But no broad policy change has occurred. The change at issue was a mere rearrangement of positions ratified by the School Board but originating with the business manager.

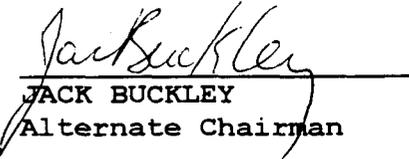
Once a contract is negotiated and executed, "...the cost items included in it are binding on the public employer, and are generally not subject to impairment by subsequent legislative action." Rochester School Board v. Public Employee Labor Relations Board v. Rochester Education Association, 119 N.H. 45 at 52 (1979). Attempts to unilaterally alter wages may be found to be unfair labor practices. Rochester School Board at 53. Unilateral change mid-term

to the heart of the bargain cannot be condoned as an acceptable exercise of managerial prerogative. Concessions were made by both parties during negotiations for the CBA and the balance created by this process must be maintained. Hillsboro-Deering School District Custodians, AFSCME Local 2715 v. Hillsboro-Deering School District, Decision No. 96-081 (November 8, 1996). The District cannot now throw up a shield of managerial prerogative to protect its action from unfair labor practice charges considering the preceding events. Keene State College Education Association, 120 N.H. at 35-36.

The District has not abided by the terms of the new CBA. The District avoided negotiations with claims of management prerogative which were followed by retaliation when the Association would not accept the School District's refusal to bargain. The School District's actions in financially punishing the former head custodians approaches the callous disregard discussed in Harkeem v. Adams, 117 N.H. 687 (1977). We find the complained of conduct to have been violative of RSA 273-A:5 I (a), (b), (c), (d), (e), (g), (h), (i). The remedy is a return to the *status quo ante* with regard to the head custodians for the duration of the CBA. The head custodians shall receive their back pay and shall continue to be paid under the negotiated terms of the CBA keeping in mind that reopener may be requested.

So ordered.

Signed this 4th day of April, 1997.

  
 JACK BUCKLEY  
 Alternate Chairman

By unanimous decision. Alternate Chairman Jack Buckley presiding.  
 Members Richard Molan and Richard Roulx present and voting.